CONSULTANT'S CORNER

PERSONAL CIVIL LIABILITY FOR MILITARY HEALTH CARE WORKERS

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In this issue, a military attorney with extensive health law experience discusses the personal liability of military health care providers. Much of his discussion applies to all providers who work in the federal sector.

INTRODUCTION

As military officers and federal employees, one of the benefits we enjoy is the relative freedom from being sued personally as a result of job performance. In this litigious society, that is no small thing. However, this freedom from suit is far from absolute. People injured or just plain frustrated by the actions of government employees can and have filed lawsuits against those employees in their individual capacities. In recent years, a slight, but noticeable increase in such cases has occurred.

This brief article will address the topic of personal civil lawsuits against Department of Defense health care providers that arise out of their employment.* Issues frequently associated with such lawsuits will be examined from the perspective of the provider.

First, however, an important cautionary point must be made. Many legal issues associated with individual liability of government employees are complex and time sensitive. If you, as a Defense health care practitioner, receive a summons or other legal document suggesting that you are being sued for actions on the job, contact your government attorney at once.

HAVE YOU BEEN SUED PERSONALLY OR NOT?

To the non-lawyer it may come as a surprise to learn that the first issue often confronted in a lawsuit is to specifically identify the parties. Exactly who is the defendant? Answering that question may not be easy. The fact that your name appears in the caption, or title, of a case does not mean that you have been sued individually.

Government employees may be sued in either their **official capacity** or **personal capacity**. The distinction is based upon whether the plaintiff seeks damages from the government or individual defendant. If the target is the government, then the real party in interest is the United States.

Whether a lawsuit is aimed at the United States or an individual federal employee can be difficult to discern. Experienced plaintiff's counsel will usually clearly state whether a named individual is being sued officially or individually. More often, however, the nature of the lawsuit can only be gleaned, if at all, from a close reading of the complaint's caption, the manner in which parties are identified in the complaint, the

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*This article will not discuss criminal actions or actions initiated against federal employees under the various state and federal environmental statutes.

characterization of the defendant's alleged acts, and the specific demand for relief or compensation.

For example, in a case styled *Jones (Plaintiff) v. Dalton (Defendant)*, the plaintiff could be seeking to set aside a medical board or attempting to obtain a higher disability rating. Though the Secretary of the Navy is named as the defendant, the real target of the lawsuit is the United States. The plaintiff seeks to compel the government to do something. Mr. Dalton is named because, as Secretary of the Navy, he is the government official most capable of executing any order to the government that the court might issue.

On the other hand, if the complaint in this hypothetical case alleges that Secretary Dalton defamed the plaintiff and seeks damages from Mr. Dalton, then he is the personal target of the suit. Compensation is not sought from the government, and Mr. Dalton is being sued individually.

The difference between personal capacity and official capacity lawsuits transcends the question of financial risk. For each type of litigation, the available defenses differ both substantively and procedurally. For example, the United States has 60 days in federal court to file an answer to a complaint while an individually named defendant has only 20 days.

WHO WILL REPRESENT YOU?

Once it is determined that a government employee has been sued personally, a major concern is whether the government will provide representation. The short answer is yes, but there are exceptions.

Federal regulations provide that both current and former government employees may request representation by Justice Department attorneys.[1] An employee request, together with an agency recommendation for approval or disapproval, is forwarded to the Justice Department. The request will be approved if the Justice Department determines that (1) the employee was acting within the scope of his or her employment at the time of the acts giving rise to the lawsuit and that (2) representation is considered to be in the best interests of the United States.

Typically, the "scope of employment" test at this juncture is applied very liberally. The question is: was the employee going about the government's business at the time of the acts giving rise to the lawsuit? Because of time constraints often imposed during the early stages of litigation, extensive fact-finding on the subject of scope of employment can be impractical. For that reason, doubts are usually resolved in the employee's favor.

The second criterion, the "best interests of the United States", is harder to define. As a practical matter, it is almost always in the government's interest to protect morale by defending federal employees who act within the scope of employment. Additionally, a clear interest can frequently be found in defending the process or integrity of the federal program involved. Rare cases where the "best interests of the United States" were denied usually have involved federal criminal prosecutions or circumstances where the employee's conduct was found to be clearly wrongful and the subject of formal disciplinary action.

Representation by Justice Department attorneys is neither automatic nor compulsory. Federal employees are free to retain counsel of their own choice when sued individually. They do so, however, at their own expense.

There are limitations on Justice Department representation. Primarily, Justice Department attorneys represent the United States. They must assert all those legal defenses that establish the non-liability of the United States, if it is also a party to the suit. This is true even in cases where securing the dismissal of the United States leaves the employee standing alone. Moreover, Justice Department attorneys cannot assert any legal defense that is not in the "best interests of the United States", even though that assertion may be in the best interests of the individual defendant. Finally, the Justice Department will not institute suit on behalf of the federal employee nor make affirmative counterclaims for money damages.

WHY ARE YOU BEING SUED?

The creativity of the plaintiffs' bar in this country is a never ending source of amazement for those of us who defend the federal government. If the ramblings of *pro se* plaintiffs (those without representation) are added to the equation, the types of litigation that can and have been brought against federal employees are limited only by imagination.

Nonetheless, from the perspective of the federal health care provider, three categories of lawsuits predominate. They are common law torts, *Bivens* type constitutional torts, and civil rights actions.

Common law torts. As their name suggests, common law torts are causes of action derived principally from the English common law, as adopted by the courts of this country. Typical of the types of cases falling into this category would be negligence (medical malpractice), assault and battery, defamation, false imprisonment, and intentional infliction of mental distress. For Defense Department medical practitioners, this category represents the most likely basis for a suit being brought against them personally.

Constitutional torts. Constitutional torts are actions for damages brought directly under the Constitution. They are not based on state common law or federal statute. By these actions, plaintiffs seek to recover damages from public officials for violations of their constitutional rights.* This type of action was first recognized by the Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[2] In that case, federal agents violated a man's Fourth Amendment rights by conducting an illegal search of his apartment. The specific theories of constitutional torts most often advanced against health care professionals are violations of the due process clauses within the Fifth and Fourteenth Amendments. This might occur, for example, in cases concerning involuntary hospitalization or medical staff credentialing.

Civil rights actions. Two laws that were enacted as part of the Civil Rights Acts of 1866 and 1871 provide statutory bases for money damage claims against federal officials who violate designated constitutional rights. Claims for damages arising out of racially based discrimination are supported by 42 U.S.C. § 1981. Recovery of damages in cases of conspiracies to violate civil rights by denying the plaintiff equal protection of the law or equal privileges and immunities under the law is provided by 42 U.S.C. § 1985.

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*In this era of increasing federal contractor presence in military hospitals and clinics, it should be noted that an independent contractor is not a "federal official" against whom a *Bivens* action can be brought. *Vincent v. Trend Western Technical Corp.*, 828 F.2d 563 (9th Cir. 1987).

As an academic exercise, it is convenient to consider these three types of lawsuits discretely. In practice, that luxury is rarely afforded. Plaintiffs often commingle common law torts, constitutional torts and civil rights actions in the same suit, even the same paragraph. One formidable challenge is to discern accurately what type of action the plaintiff is trying to bring.

WHAT DEFENSES ARE AVAILABLE?

For the average federal employee sued as an individual, this is where the rubber meets the road. The simple question is, "How do I win this lawsuit?"

There is a wide range of defenses that can be deployed on behalf of an individually named defendant. They begin with defenses based on Rule 12(b) of the Federal Rules of Civil Procedure. For example, it can be argued that the court lacks jurisdiction over the parties to the suit or over the subject matter of the case. Another extremely effective procedural defense is that the complaint fails to state a claim upon which relief can be granted.

At the other end of the spectrum are potential defenses that address the merits of a claim. These defenses are not favored, however, since the federal employee is then subjected to the rigors and risks of protracted litigation. Additionally, there are tremendous costs to society associated with litigation against public officials. Attention is diverted from job performance, frequently at the expense of pressing public issues. Able citizens might be deterred from accepting public office. If they do accept the challenge of the job, they may be inhibited from fearlessly and vigorously administering their office. Finally, because federal attorneys usually represent federal officials, the costs of defending these personal lawsuits are shifted to the public.

The doctrine of official immunity for public employees has emerged to address these factors. Immunity may derive from federal statutes or case law. This form of immunity may be absolute or qualified. Absolute immunity, where applicable, serves as a complete bar to suit, whether the federal employee acted with malice or in bad faith. On the other hand, qualified immunity only protects officials who act reasonably.

Whether or not an official immunity defense applies in a given case is contingent upon several factors. As a threshold matter, it must be determined whether the employee was acting within the scope of employment. Next, the nature of the claim asserted by the plaintiff must be examined. As a general rule, absolute immunity is available for common law torts, while a qualified immunity is available for constitutional torts and civil rights actions.

Immunity in Common Law Tort Cases. There are two statutes affording Department of Defense health care providers absolute immunity: the Gonzales Act and the Westfall Act, formally known as the Federal Employees Liability Reform and Tort Compensation Act.[3,4] When applicable, these laws provide that the exclusive remedy for the case under consideration is against the United States under the Federal Tort Claims Act.

The Gonzales Act was designed to "meet the serious and urgent needs of defense medical personnel by protecting them fully from any personal liability arising out of the performance of their

official medical duties."[5] Absent immunity, Congress was concerned that military medical personnel would be unduly cautious in their administration of care to patients, that the threat of litigation would undermine morale, and that recruitment and retention of medical personnel in an all-volunteer military would be difficult. The Gonzales Act was patterned on legislation affording similar protection to medical personnel of the Veteran's Administration, the Public Health Service, and the State Department.[6,7,8]

In general, the Gonzales Act was an attempt to protect military health care personnel from tort liability arising out of the performance of all health care related functions. This statute has, however, two important limitations. First, it affords no protection where the employee is performing non-medical, command functions. Second, it does not immunize medical personnel serving outside of the United States.[9,10]

These loopholes were addressed by the Westfall Act. Westfall states that the sole and exclusive remedy for the negligent acts or omissions of any federal employee is the Federal Tort Claims Act. It is not limited to medical functions. More importantly, as the Supreme Court made clear in 1991 in *United States v. Smith*, Westfall applies to personnel stationed outside the United States.[11]

Gonzales and Westfall afforded federal employees broad immunity from common law torts. Both statutes, however, are conditioned on an important finding, that the federal employee was acting within the scope of employment at the time of the conduct giving rise to the lawsuit. Unlike the scope of employment determination previously discussed in the context of providing Justice Department representation, this determination is applied far more rigidly. Full development of pertinent facts and strict adherence to statutory terms are the norm.

Within the medical world, this issue has received considerable attention in the case of out-service trainees. Prior to the Supreme Court's decision in the aforementioned *Smith* case, several lower courts were in disagreement as to whether the statutes applied to military physicians performing residencies at civilian hospitals.[12,13] Applying the "borrowed servant" doctrine, some courts decided that those military physicians could not possibly be within the scope of their federal employment since, for purposes of liability, they were considered employees of the civilian facility. After *Smith*, this logic lost its currency. The present, and better, analysis adopts the plain language of the Westfall legislation and considers out-service trainees as entitled to absolute immunity for cases arising out of that training.[14]

Immunity in Constitutional Tort and Civil Rights Cases. By their very terms, neither the Gonzales Act nor the Westfall Act apply to constitutional tort or civil rights actions. Two judicially crafted immunities, however, usually do apply.

Under the landmark case of *Feres v. United States*, military officials enjoy the benefit of the doctrine of "intra-service" or "intra-military" immunity.[15] This immunizes military personnel from liability for tortious conduct involving other military personnel. Until June 1983, the rationale supporting the *Feres* decision was successfully argued to apply with equal force in constitutional tort cases. The Supreme Court then decided *Chappell v. Wallace*.[16] While declining to specifically adopt the *Feres* rationale, the Court did determine that there were special factors affecting good order and discipline in the

military that militated against permitting constitutional torts suits by service members against fellow military members. Whatever rationale is chosen, the result is the same. Military personnel may not be sued by other military personnel for constitutional torts or civil rights actions.

The more common official immunity doctrine in constitutional torts and civil rights cases is that of qualified immunity. As a general rule, qualified immunity protects federal employees sued in these types of actions when their conduct does not violate clearly defined constitutional rights.[17,18] The employee's conduct is analyzed to determine if it was objectively reasonable. In other words, would a reasonably prudent person in the shoes of the employee have realized that the conduct in question would violate the plaintiff's constitutional rights? If the employee acts in good faith, the answer should be no, and immunity applied.

CONCLUSION

Given the propensity of our nation's citizens to litigate, it is certain that federal employees will continue to be the subject of lawsuits. This is especially true for those employees who toil in the field of medicine.

Notwithstanding the possibility of being named as a defendant, federal employees should be comforted by the broad protections they are afforded under the statutory and judicially crafted immunities described above. These are extremely powerful tools to ward off the specter of liability. In summary, from a pragmatic point of view, the probability that a military health care provider will be held personally liable in a civil suit is very slight.

REFERENCES

1. 28 C.F.R. §§ 50.15 and 50.16.
2. 403 U.S. 388 (1971).
3. 10 U.S.C. § 1079.
4. 26 U.S.C. §§ 2671, 2674, and 2679.
5. S. Rep. No. 1264, 94th Cong., 2d Sess. 2 (1976).
6. 38 U.S.C § 4116.
7. 42 U.S.C. § 233.
8. 22 U.S.C. § 2702.
9. *United States v. Smith*, 885 F.2d 650 (9th Cir.1990).
10. *Newman v. Soballe*, 871 F.2d 969 (11th Cir. 1989).
11. 499 U.S. 160, 111 S.Ct. 1180 (1991).
12. *Green v. United States*, 709 F.2d 1158 (7th Cir. 1983).
13. *Afonso v. City of Boston*, 587 F. Supp. 1342 (D. Mass. 1984).
14. Ward v. Gordon, F.2d , (9th Cir. 1993), 1993 WL 27551.
15. 340 U.S. 135 (1950).
16. 462 U.S. 296 (1983).
17. Butz v. Economou, 438 U.S. 478 (1978).
18. Harlow v. Fitzgerald, 457 U.S. 800 (1982).